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In the Supreme Court of the United States

October Term, 1955

No. 644

SYLVANIA ELECTRIC PRODUCTS, INC.,
Petitioner, and Appellant below,

vs.

IRENE BARKER, Executrix,
Respondent, and Appellee below,

RESISTANCE TO ALLOWANCE OF CERTIORARI, BRIEF OF RESPONDENT

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RESISTANCE TO ALLOWANCE OF CERTIORARI, BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Does the petition present any valid considerations governing review on certiorari of the Circuit Court of Appeals in a diversity of citizenship tort case?

2. Does the exercise of sound judicial discretion warrant this Court in assuming jurisdiction of a diversity of citizenship case reflecting an entire lack of exculpatory evidence of defendant's negligence, where plaintiff below has made out a prima facie case and petitioner-defendant has failed completely to assume the burden of going forward with such exculpatory evidence, if any?

3. Did the District Court and the Circuit Court of Appeals improperly apply Nebraska Law in interpreting Nebraska Statutes of Limitations in a diversity of citizenship case where such statutes were pleaded by petitioner-defendant in the Court below?

4. Did the District Court in the trial court's charge to the jury and the Circuit Court of Appeals on appeal improperly apply the law of evidence concerning extrajudicial inconsistent statements made by a party in a proceeding against a different defendant in another state, where there was other competent evidence to the contrary to raise a jury question?

5. Should this Court grant certiorari to review the admission of the evidence of a qualified actuary of life expectancy of decedent where the trial Court charged the jury that such expert evidence might be rejected entirely by them?

STATEMEN

THE PROCEEDINGS IN THE DISTRICT COURT

The petition for Writ of Certiorari omits to state, as required by Rule 23 (g), that the basis for Federal Jurisdiction in the Court of first instance was diversity of citizenship, between plaintiff as a Nebraska citizen and the defendant, a Massachusetts Corporation, a citizen of Massachusetts, and that the amount in controversy in each case exceeded the sum of $3000.00.

Petitioner persists in this Court in setting forth as evidence facts which do not appear in the Joint Record Appendix, although its attention was pointedly directed to such inaccuracies in Appellee's brief before the Circuit Court of Appeals.

On page 3 of the petition the petitioner's assertion that Rexford L. Barker began blowing beryllium-coated tubing as early as 1931 is not reflected by the testimony. Neither petitioner's citation (JRA 66, 73, 81, 111), nor elsewhere in the record, is there testimony that the tubing blown by Barker contained beryllium before 1939 (JRA 73, 74, 110). Furthermore, Barker expressly denied working with coated tubing before 1941 (JRA 74) although in 1941 Barker himself coated the inside of plain glass tubes (JRA 77), there was no competent evidence that the fluorescent powders used for this purpose contained beryllium (JRA 77, 111).

It was not in 1944, as asserted by petitioner on page 4 of the petition, but in 1946 that Barker's employer bought and used petitioner's tubing (JRA 105, 119, 120). Four thousand to five thousand feet of this tubing were processed by Barker in the year 1946 (JRA 48). During this period he also blew tubing supplied by General Electric Company (JRA 119, 122). Petitioner omits to disclose as essential facts in the record that the coated fluorescent tubing used by Barker prior to 1944 was different from that supplied later (JRA 101, 102). The earlier coating adhered tightly to the glass and would not slough off during the bending process. The only sloughing apparent in tubing used prior to 1944 was that after it had burned awhile, it would come off in flakes but not as dust

(JRA 82, 93, 94, 102, 103). The tubing used after 1944, however, contained a powder or dust which would slough off upon being processed by Barker (JRA 82, 83, 94, 102), and became inhaled into his lungs (JRA 48, 49, 50, 155).

It was not until 1947 that Barker first noticed that his health might be affected (JRA 53, 181). Prior to that time he enjoyed good health (JRA 50, 124, 181). Except for one day when he had a cold, he never laid off of work from 1937 to 1947 (JRA 176, 181). Until 1947 he played golf every Saturday afternoon. He was a tournament golfer (JRA 51, 181). During the winter, the week end would be devoted to bowling (JRA 180). He played football and did push-ups with his son, and never complained of physical ailments (JRA 180). During 1945 in all kinds of weather he worked out of doors, repairing Neon signs, climbing up and down, and moving about heavy ladders to do so. During the year 1945, he was not bending any tubes (JRA 45, 50, 77, 180). It was not in the first interview with Dr. Dunn, but at a later time, when he and the doctor were digging out his history that he reported a tiredness in mowing his lawn (three lots in size) in 1943 (JRA 85, 164, 165, 177). His tiredness was not progressive from 1944 on (JRA 86).

During the first part of 1948, Barker consulted with Drs. Tipton and Offerman and finally with Dr. F. L. Dunn (JRA 53). He complained of loss of stamina and shortness of breath commencing in December of 1947 (JRA 53). Following July 27, 1948, when he first saw Barker, Dr. Dunn performed many tests in diagnosing Barker's disease. Within four to sixteen weeks (JRA 170), he had diagnosed Barker's condition as chronic lung disease due

to beryllium poisoning (JRA 141, 146). In part, this diagnosis was based on X-ray pictures taken of Barker's chest during the period from 1948 to 1952 (JRA 142, 143, 144, 145, 146). In part, the diagnosis was based on negative examinations eliminating tuberculosis and Boeck's sarcoid as effecting causes of illness (JRA 146). After Barker's death on September 12, 1952, Dr. Dunn supervised an autopsy of his body (JRA 150). A microscopic examination of sections of Barker's lung tissue revealed scar tissue and foreign body giant cells characteristic of beryllium poisoning (JRA 154). There was further revealed the presence in such cells of what, in the opinion of Dr. Dunn, were crystals of beryllium oxide (JRA 154). These were ascribed by him to be the cause of Barker's death (JRA 156).

The chemical analysis made in 1951 of one of petitioner's tubes furnished to Barker's employer in 1946 revealed that amount of beryllium oxide removed from the tube represented 2.41 per cent by weight of the powder contained in it (JRA 129).

The experience of the medical profession is that the median interval between inhalation of beryllium oxide into the lungs and the manifestation of severe symptoms is under two years (JRA 174).

Barker testified that before 1944 there was not the same exposure to loose powders in fluorescent tubes as there was after 1944, and that it was after 1944 that he first noticed that the powders would slough off (JRA 82, 83, 101, 102); that the first time that he ever heard the word "beryllium" was probably in October, 1948; that at no time was he informed by the petitioner of the nature

and content of the coating on the inside of fluorescent tubing bearing its trade-mark (JRA 61); that he did not know at any time what the chemical contents of the powders were; that although the powders would get on his lips after 1944, he did not know it was getting into his lungs (JRA 77, 95, 97).

The release executed by Barker in favor of General Electric Company in settlement of his claim against this supplier for the same disability claimed in the instant suit is limited in its terms to that company (Ex. C, JRA 281, 283). The release provided that Barker "hereby reserves all rights, claims and demands that he may have against other suppliers of material to Neon Products Company, and this contract and release is intended solely as a full settlement and adjustment of all claims of first party against second party." (JRA 282.) Like reservations are contained in the releases to General Electric executed by Irene Barker in her own behalf (Ex. D, JRA 203, 235), and as guardian for her son (Ex. E, JRA 286, 288).

Decedent Rex Barker earned, before his disability, approximately $6,000.00 a year. All but $12.00 or $15.00 per week were handed over to plaintiff, his wife, who paid all the bills of the family and saved the balance (JRA 179). Witness Boermeister, an actuary with the John Hancock Life Insurance Company for nearly 25 years, testified that in accordance with the United States census tables applicable to all persons in the United States, a man of Barker's age on September 12, 1952, would have a life expectancy of 28.1 years (JRA 133, 134). He further testified that it would take $19,089.00 at

3% interest to produce an income of $1,000.00 over 28.1 years, and $114,534.00 at 3% interest to produce an income of $6,000.00 over that period of time.

The facts concerning the verdicts returned by the jury and the disposition of the motions made by parties thereafter are stated by petitioner.

THE PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS

The proceedings in the Circuit Court of Appeals are set forth in the petition.

ARGUMENT

REASONS FOR DISALLOWING THE WRIT

I.

The Petition does not present any valid consideration governing a review on certiorari of the Circuit Court of Appeals decision in a negligence case.

A. The petition presents no important question of Federal Law not settled by this Court.

This Court has held several times that where lower Federal Courts are applying local law, the Supreme Court will not set aside their ruling except on a plain showing of error, and only in exceptional cases will the Supreme Court review the application of local law by lower Federal Courts.

D. Del Vechio v. Bowers, 296 U. S. 280, 285, 80 L. ed. 229, 232, 56 S. Ct. 190.

Palmer v. Hoffman, 318 U. S. 109, 87 L. ed. 645, 63 S. Ct. 477.

District of Columbia v. Pace, 320 U. S. 698, 702, 88 L. ed. 408, 410, 64 S. Ct. 406.

Buxby v. Electric Utilities Employees Union, 323 U. S. 72, 89 L. ed. 78, 65 S. Ct. 142.

Petitioner does not contend that the Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court; nor has it decided a Federal question in a way in conflict with applicable decisions of this Court.

The jurisdiction taken by the Federal Courts in these cases was solely by virtue of Section 1332 of Title 28, United States Code Annotated. The two actions respectively were for personal injuries, conscious pain and suffering and for death to respondent's decedent, a resident of Omaha, Nebraska, proximately caused by the negligence of the petitioner, a Massachusetts Corporation. The amount in controversy in each case exceeded $3000.00. It constitutes the only basis for Federal jurisdiction of these cases, although not set forth in the petition as required by Rule 23 (g) of the Rules of this Court.

B. The decision of the Circuit Court of Appeals is not in conflict with the decision of another court of appeals on the same matter.

Even if there were any conflict as to questions controlled by State law, conflict among Federal Circuit Courts of Appeals, that is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States, as the conflict may be merely corollary to a permissible difference of opinion in the State Courts.

Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202, 82 L. ed. 1290, 58 S. Ct. 860.

However, it must be emphasized that the petitioner does not contend that the decision of the Court of Appeals is in conflict with any decision of another Court of Appeals on the same matter.

C. There is no departure from the accepted and usual course of judicial proceedings by the lower court.

Petitioner has not contended that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervision. There is no contention that the cases were not fully, fairly and carefully tried (JRA 218) before the trial court and jury, nor is it contended that a full and impartial hearing was not allowed to all parties on appeal before the Circuit Court of Appeal.

II.

It is not the function of this Court in a diversity case to conform the law of one state to that of another or of the United States.

Petitioner appears to have devised a consideration or reason distinctly its own and not contemplated by Rule 19 of this Court, its prime reason being that the decision of the Circuit Court of Appeals "conflicts with the common law principles of negligence as a cause of action for personal injury in every common law state in the United States, and particularly in the United States District Courts heretofore applying such law."

Except for situations where the Constitution of the United States speaks to the contrary, this Court has adhered to the proposition that the law of each of the several states must stand as enunciated by its Courts and its Legislature even if in conflict with that of a sister state or of the United States.

Speaking for the Court in *Great Northern Ry. Co. v. Sunburst,* 287 U. S. 358, 77 L. ed. 360, Mr. Justice Cardozo said at pages 365 and 366:

> "The choice for any state may be determined by the juristic philosophy of the judies of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. * * * The common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished, for intermediate transactions, by a decision overruling them. * * * If this is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, we are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process."

Counsel apparently asks this Court to rely upon the case of *Lebourdais v. Vitrified Wheel Co.,* 194 Mass. 341, 80 N. E. 482, decided in 1907, cited and quoted by petitioner as authority for disregarding *Thornhill v. Carenter-Morton Co.* (1915), 220 Mass. 593, 108 N. E. 474; *Farley v. Tower* (1930), 271 Mass. 230, 171 N. E. 639, 86 A. L. R. 941, and *Carter v. Yardley & Co., Ltd.* (1946), 319 Mass. 92, 64 N. E. 2d 693, 164 A. L. R. 559, cited in the decision by the Circuit Court of Appeals in support of

the rule in Massachusetts that every manufacturer of an article or substance that he himself has made or compounded will be charged with notice of the quality and constitutents of that article and cannot excuse himself on the grounds that he did not know of its dangerous quality.

Petitioner's contention in the Courts below, and here, that there was no evidence that defendant knew or should have known of any danger inherent in beryllium cannot be sustained under the modern concept of a manufacturer's liability to an ultimate consumer as expressed in those cases following the rule announced in *MacPherson v. Buick Motor Company* (1916), 217 N. Y. 302, 111 N. E. 1050.

The unsound rationale of the 1907 Lebourdais decision, supra, cited by petitioner, was unmasked by Justice Cardozo in the *MacPherson* case, supra, wherein we find his much quoted, pungent observation on page 1053 of the Northeastern Report:

> "Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be."

In 1946 Massachusetts gave sweeping acceptance to the doctrine of *MacPherson v. Buick Motor Co.*, supra, and expressly abandoned and threw into the discard the 1907 rule of *Lebourdais v. Vitrified Wheel Co.*, supra, in the following language from page 700 of 64 Northeastern 2nd as follows:

> "The time has come for us to recognize that the asserted general rule no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth."

Counsel now asks this Court to require the Circuit Court of Appeals to conform to the rule of negligence first found to be unsound in *MacPherson,* supra, and since abandoned by both Massachusetts and Nebraska.

Twenty-seven pages of Appendix C to the petition is devoted to a verbatim copy of *Harman v. Mitchan Works, Ltd.,* an as yet unreported English decision. This decision, in its entirety, was before the Circuit Court of Appeals, copied into petitioner's reply brief, and considered by that Court.

It discloses that by 1948 (two years after Rex Barker's exposure to beryllium in petitioner's lethal product (JRA 105, 119, 120)), the dangers of beryllium were discovered to be so great that it is no longer used and has been replaced by a different substance (Pet. App. c. 44-45). Accordingly, it is obvious that the cases at bar are perhaps among the last involving beryllium poisoning and there is consequently no factual question of any particular novelty or future importance involved.

This case also irrevocably refutes petitioner's argument that before 1946 there was no reason to suspect beryllium as a dangerous agent by reference to an American Article on "The Toxicology of Beryllium," published in the fall of 1943, in which it was said that a chemical pneumonia had been observed in three workmen employed in extraction of beryllium oxide (Pet. App. C-44). By

reference to the *Harman case,* supra, petitioner apparently seeks to pull itself up by its boot straps, having failed to introduce in the trial court any evidence either admitting or denying knowledge, or a reasonable opportunity to ascertain the inherent dangers of beryllium which it was releasing to the Neon sign industry, and respondent's decedent in particular.

In the light of *Erie R. Co. v. Thompkins,* 304 U. S. 64, 82 L. ed. 1188, followed by *Klaxon Company v. Stentor Electric Manufacturing Company, Inc.,* 313 U. S. 487, 85 L. ed. 1477; *Griffin v. McCoach,* 313 U. S. 498, 85 L. ed. 1481, and the plethora of decisions since Erie expanding the rule that in diversity cases the law of the State as declared by its Legislature or by decisions of its highest Courts is not a matter of Federal concern, the petitioner in effect now asks this Court to exhume the bones of *Swift v. Tyson,* 16 Pet. 1, 10 L. ed. 865, and to coordinate them with the sinews and tendons of a Federal common law of petitioner's own choice and persuasion in the field of negligence and the conflict of laws.

III.

The trial court and the Circuit Court of Appeals properly applied Nebraska law in interpreting Nebraska Statutes of Limitations pleaded by petitioner-defendant.

The complaint in the personal injury action was filed on August 4, 1950 (JRA 1). A special interrogatory was submitted by the Court to the jury requesting them to ascertain on what date Barker knew, or should have known, that he was suffering from beryllium poisoning. The answer to this interrogatory was: December 1, 1948

(JRA 249); hence the action was commenced within two years of the time Barker knew or should have known he was suffering from beryllium poisoning.

The applicable Massachusetts Statute provided that the limitation for negligently caused personal injury is six years (Pet. App. B-38-39).

Section IX of the quoted Massachusetts Statute "borrows" the foreign state's statute where its limitation period is less than the six-year period of Massachusetts. In Nebraska the Statute of Limitations in tort actions is four years (Pet. App. B-36).

In referring to Sec. 25-207, R. R. S. Nebraska, 1943, petitioner on page 13 states the Nebraska statute limits a cause of action for negligence to four years "after the occurrence giving rise to it." No such language is included therein.

When the cause of action actually accrues and the statute of limitations commences to run must be determined from Nebraska case law.

The general rule in wide, if not universal, application as to "borrowing" statutes, is that in determining whether the action is barred at the forum, the statute of the sister state is to be given the effect which it would have in that state.

Bacon v. Rives, 106 U. S. 99, 27 L. ed. 69, 1 S. Ct. 3.

Hilliard v. Pennsylvania R. Co. (CCA 6, 1935), 73 F. (2d) 473 (Cert. den. 294 U. S. 721, 79 L. ed. 1253, 55 S. Ct. 548).

Extensive annotations on this subject are found in 75 A. L. R. 203, and 149 A. L. R. 1224.

The petitioner cites no Massachusetts authority for the denial of the general rule in the cases at bar.

In cases of traumatic injury, where there is some apparent injury at the time of the trauma, generally speaking the cause of action immediately results, so that for limitation purposes the situation is simplified as to the time the action accrues. Such a situation logically differs from the mere exposure to a disease which may have a long, or comparatively long, latent period prior to the manifestation of any symptoms.

In *Urie v. Thompson,* 337 U. S. 163, 93 L. ed. 1283, 69 S. Ct. 1018, 11 A. L. R. 2d 252, this situation was faced squarely by this Court in a case involving a negligence action brought under the Federal Employers' Liability Act, wherein the Court held that the action was not barred by the statute of limitations since it was brought within three years from the date of discovery by the plaintiff of the disease. It is to be noted that in *Urie* the period of continuous exposure to silica dust encompassed some 28 years before Urie's condition was diagnosed and established as a silicosis.

The Supreme Court of Nebraska is in accord with the salutary and reasonable rule laid down in *Urie v. Thompson,* supra, and has repeatedly held that when a disease is latent and progressive, the statute of limitations is not made applicable until the person suffering therefrom acquires knowledge of the disability.

Thus, in *Keenan v. Consumers Public Power District* (1949), 152 Neb. 54, 40 N. W. 2d 261, where an employee suffered an injury, the character of which is ascertainable only by medical men, and medical men are unable to ascertain it up to a certain time, the statute of limitations does not begin to run until the injury is ascertained. To the same effect see *Dryden v. Omaha Steel Works,* 148 Neb. 1, 26 N. W. 2d 293.

In harmony with these expressions by the Nebraska Court, is the case of *Williams v. Elias,* 140 Neb. 656, 1 N. W. 2d 121, wherein the rule of *Capucci v. Barone,* 266 Mass. 578, 165 N. E. 653, was specifically rejected in concluding that a tort action for malpractice was not barred by a two-year limitation of Section 20-208, Comp. St. Supp. 1939 (now Section 25-208, R. R. S. Neb. 1943), if the action were commenced within two years from the time treatment ended.

This consistency of the approach of the Nebraska Supreme Court to the application of its statute of limitations leaves no doubt that if the instant case were presented to the Nebraska Supreme Court, the determination of that Court would be identical to that arrived at by the court below, based on the jury's answer to special interrogatory, to wit, that the personal injury action was commenced within two years from the time it was discovered.

IV.

Admissions contained in extra-judicial proceedings, where parties are not identical, are given only the force of admissions to be considered by the jury and are not conclusive upon the party making them.

Petitioner charges respondent's decedent with *"perjuring himself successfully to deceive and defraud one of two Courts for the purpose of obtaining money"* and then inquires whether plaintiff can *"by false statements under oath diametrically opposed in the two instances profit materially and financially therefrom in both courts?"* Respondent suggests that these charges are utterly untrue, absolutely without foundation, and that the insinuations and innuendo made against a decent, hard-working artisan, suffering and dying a horrible death, as a sacrifice on the altar of industrial development, are so scandalous in and of themselves as to deprive petitioner of any further consideration under Rule 40, paragraph 5 of this Court.

Respondent would not be surprised at such an ad hominem attack before a jury, but it is frankly astounded that it could be urged here as a reason for a review on certiorari.

The Court's attention is directed to the disposition made of this attack by the Circuit Court of Appeals (Pet. App. A. 22, 23, 24, 25). It is respectfully submitted that all of the answers respondent might make are there calmly and objectively set forth.

V.

There was no error in the admission of the actuary's testimony considered in the light of the trial court's charge to the jury.

Respondent is again confounded by the suggestion made by petitioner in Section 4 of its argument that because Barker was suffering from berylliosis sustained as the result of the negligence of the petitioner, the actuary's

testimony, admittedly based on statistics covering healthy individuals, was inadmissible since Barker was not healthy when he died and his life expectancy at death should not be allowed to be measured by such statistics.

None of the cases cited by petitioner hold to this theory, nor can respondent find any cases supporting such a rule.

Respondent concedes that had Barker been in less than perfect health by reason of causes other than beryllosis the actuary would have had to measure his life expectancy accordingly.

Before Barker contracted beryllosis, he enjoyed better than average health (JRA 50, 124, 181); from 1937 to 1947 he had lost but one day's work due to a cold (JRA 177, 181). He was a tournament golfer (JRA 51, 181) until he was exposed to petitioner's product in 1946. Throughout 1945 he worked outdoors doing heavy manual labor (JRA 45, 50, 77, 180).

Certainly but for the beryllosis contracted in using petitioner's product, Barker would normally have been expected to live out the expectancy based on healthy individuals.

The actuary also further testified as to the amount required at 3% interest to produce an income of $1,000 annually for Barker's life expectancy. The trial court fully and fairly charged the jury with respect to the actuary's testimony and cautioned them that they were not required to accept it but might reject the evidence entirely (JRA 229, 230).

CONCLUSION

Respondent respectfully submits that petitioner is not entitled to review on certiorari. No Federal question has been decided by the Circuit Court of Appeals; the decision is not in conflict with any decision of any other Circuit Court of Appeals; no important State question has been adjudicated by either Court below which in any wise is incompatible with the law of Massachusetts or Nebraska applicable to these cases; and there has been no unseemly departure from the accepted and usual course of judicial proceedings warranting supervision by this Court.

The Respondent therefore respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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